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CASE NOS. 89-1391, 89-1392

In The
United States Supreme Court

October Term, 1989

DR. IRVING RUST, ET AL.,

Petitioners,

v.

DR. LOUIS SULLIVAN,

Respondent,

and

THE STATE OF NEW YORK, CITY OF NEW YORK, THE NEW YORK CITY HEALTH AND HOSPITALS, CORP.,

Petitioners,

v.

DR. LOUIS SULLIVAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Petitioners the State of New York and Dr. Irving Rust, et al., have presented four questions each for review. Amicus State of Ohio wishes to address these questions as follows:

1. Do new regulations promulgated by HHS under Title X of the Public Health Service Act which prohibit abortion counseling, referral and advocacy in programs funded under the Act and require physical separation of Title X funded facilities and facilities engaging in abortion-related services, violate the woman's and the health professional's First Amendment rights?

2. Does the regulations' prohibition of abortion counseling and referral in a Title X-funded program violate the woman's constitutionally protected privacy right to make a fully informed decision on whether or not to continue her pregnancy?

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BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This brief is filed by Anthony J. Celebrezze, Jr., Attorney General of Ohio, joined by the states of Alaska, California, Connecticut, Maine, Nebraska, Oregon, and Texas, and the District of Columbia. These states,[1] where Title X funds are utilized to provide health care services to hundreds of thousands of citizens,[2] have joined together to urge this Court

[1] Most state agencies that receive and disburse Title X funds are members of the association entitled the National Family Planning and Reproductive Health Association ("NFPRHA") and are plaintiffs-appellees in *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279, Slip Op., 1990 U.S. App. LEXIS 4236 (1st Cir. March 19, 1990) (en banc).

[2] State agencies in the *amici* states of Ohio, California, ~~Maine~~, Nebraska, Oregon, and Texas, and the District of Columbia participate directly in the Title X program. All of the amici states have local Title

to grant the Writ of Certorari filed by Petitioners in Case Numbers 89-1391 and 89-1392.

This case presents issues of critical national importance. The amended regulations to the Public Health Services Act, Title X, if permitted to go into effect, will force states to choose between accepting federal Title X funds under a program which will provide incomplete and possibly misleading medical information and invade the integrity of the physician-patient relationship, and forfeiting receipt of Title X funding altogether. Either option will have devastating repercussions on the abilities of the *amici* states to provide effective family planning and related health care services to low income women.

The state agencies that both receive and disburse Title X funds have a unique interest in the regulations issued by the Department of Health and Human Services (hereinafter HHS). Most of the *amici* states provide matching funds from their own revenues to support Title X projects. The regulations, as amended, would expand the definition of "Title X Project" in such a way as to require that these *state* funds also be used to provide misleading and possibly medically dangerous information to women. The amendments will unnecessarily impede these states' capacities to allocate their own funds to provide more balanced post-pregnancy counselling and referral services, even outside the ambit of the federal Title X program.

SUMMARY OF ARGUMENT

Amici states support and join in the arguments presented by Petitioners and *amici,* the American Public Health Association, *et al.* Most of these arguments will not be reiterated here. Rather, this brief will focus on issues of particular concern to Ohio and the other *amici.*

[2] *footnote cont.*
X grantees within their borders. The sacrifice of the health and welfare of low income women is, naturally, of great concern to all the *amici* states.

Because the regulations at issue in these petitions will result in provision of incomplete and slanted information to the women of Ohio and other states, they will undermine, rather than promote, each individual woman's right to make in an informed way her own reproductive health decisions. Because the amended regulations forbid a Title X physician from discussing the abortion option with a woman, even when the abortion may be advisable to protect her health, they directly jeopardize the health of the patient. Because the regulations require a Title X physician to practice medicine in a way which conflicts with sound medical practice and professional ethics, should the regulations go into effect in Ohio and other states, many Title X providers may simply refuse further participation in the program. That would result in more restricted access to Title X facilities by the states' low income women, many of whom have no alternative source of care, and further adverse consequences to the health of these women.

Moreover, the decision below must be reversed because it conflicts with the law as established by this Court. The amended regulations cannot be upheld under the government's discretion not to fund certain programs, because the rules regulate pure speech in a content-discriminatory manner. The amended regulations require the dissemination of information about childbearing but censor speech about abortion. The amended regulations establish a rigid, misleading exchange between patient and physician, which, under the imprimatur of a government program, implies to the patient that she has received full information about her choices. In fact, the option to terminate her pregnancy has not been disclosed. By intentionally misleading the patient regarding her choices, the regulations erect an impermissible obstacle to the woman's liberty and privacy rights to determine what shall be done with her body.

In addition, the regulations impose an unconstitutional condition upon the receipt of a government benefit. Title X provides both grants to Title X clinics, and subsidies for medical, counselling and referral services to Title X patients. As a condition to receiving these benefits, both the patient

and health professional must relinquish their First Amendment rights to exchange information about the termination of pregnancy. The federal government cannot require this gag on pure speech consistent with the First Amendment.

Finally, the regulations redefine the scope of the Title X project in such a way that matching funds provided by Ohio and other *amici* states would be swept within the new rules. If the states continue to participate, state tax dollars would be required to be used to mislead needy women regarding their choices and perhaps to jeopardize their health. Such conditions on the expenditure of state monies would be inconsistent with the constitutional spending power of Congress because such requirements would not promote the public welfare, the conditions for state participation are vague, the regulations contravene the purpose of Title X funding, and the rules would require state funds be used to defeat the constitutional rights of Title X patients.

REASONS FOR GRANTING THE WRIT

I. THE TITLE X AMENDED REGULATIONS WILL RESULT IN DETERIORATION OF HEALTH CARE SERVICES TO LOW INCOME WOMEN AND WILL PROVIDE INCOMPLETE AND MISLEADING INFORMATION TO WOMEN MAKING REPRODUCTIVE HEALTH DECISIONS

This Court has held that the government may, in the exercise of its spending powers, flatly decline to pay for the medical procedure of abortion, *Harris v. McRae,* 448 U.S. 297, *reh. denied,* 448 U.S. 917 (1980); *Maher v. Roe,* 432 U.S. 464 (1977), or refuse to permit the procedure to be performed in government-owned facilities, *Webster v. Reproductive Health Services,* 109 S. Ct. 3040 (1989), notwithstanding a woman's constitutional right to freedom of reproductive choice. *Roe v. Wade,* 410 U.S. 113 (1973). This Court's decision in *Webster* did not address the issue presented herein, as the majority concluded the First Amendment question presented by the prohibition on

abortion counselling and referral from publicly funded family planning clinics was moot. 109 S. Ct. at 3053-54. It was further noted that a constitutional issue could arise if the statute were interpreted to prohibit publicly employed health professionals from giving specific medical advice. *Id.* at 3060 (O'Connor J., concurring), 109 S. Ct. at 3069 n.1 (Blackmun J., concurring).

The Second Circuit, relying upon *Maher, Harris, and Webster,* impermissibly extended the idea that the government may refuse to subsidize the medical procedure of abortion to find that the government may suppress pure speech. The Second Circuit has authorized regulations which serve to interfere with the integrity of the physician-patient relationship. Tampering with the physician-patient relationship will result in health care professionals providing less than complete information, at best, and more likely, misleading information to women faced with the need to make reproductive health decisions. Contrary results, that the amended regulations violate the privacy interests of women and First Amendment interests of women, physicians, and health care professionals, have been reached in the United States Court of Appeals for the First Circuit and the United States District Court in Colorado. *Massachusetts v. Secretary of Health and Human Services,* No. 88-1279, Slip Op., 1990 U.S. App. LEXIS 4236 (1st Cir. March 19, 1990) (en banc); *Planned Parenthood Federation of America v. Bowen,* 680 F. Supp. 1465 (D. Colo. 1988) (appeal pending). This case presents the opportunity for this Court to resolve the discrepancy between the circuits and affirm the need for free flow of information before informed choice can occur.

A. THE AMENDED REGULATIONS WILL RESULT IN DETERIORATION OF HEALTH CARE SERVICES TO THOSE IN MOST DESPERATE NEED.

Title X of the Public Health Service Act authorizes grants to profit and non-profit organizations "to assist in the establishment and operation of voluntary family planning projects" servicing mostly low income families. 42 U.S.C.A. 300, et seq. (West 1982). Title X is the single largest voluntary

family planning program funded by the federal government, providing over one-third of the total public family planning funds. Comment, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?* 41 Stan. L. Rev. 401, 408 (1989) [hereinafter *Gag Rule*]. Title X serves approximately 4,300,000 low income women annually through more than 4,000 family planning clinics which receive some $140 million in Title X grants. McCarthy, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics,* 77 Calif. L. Rev. 1181, 1183 (1989) [hereinafter *Abortion Counseling*]. Entities receiving Title X funds include health departments at the state, county and municipal levels, family planning clinics, hospitals, and community health organizations. Public health departments receive approximately 40 per cent of the available Title X funds. *Gag Rule,* 41 Stan. L. Rev. at 408. States that receive Title X funds are required to provide a minimum of 10 per cent matching grants of state money. 42 U.S.C.A. §300a-4 (West 1982).

The reach of the amended regulations extends far beyond the mere expenditure of federal dollars. "Title X Programs" and "Title X Projects" as redefined include not only direct federal subsidies, but any other funds, public or private, used in the Title X project. 42 C.F.R. §59.2 (1988). If a state contributes to the Title X project, or if the clinic uses its own private funds to support Title X activities, the use of these alternative funds is likewise held hostage to the Title X requirements, and gagged as well.[3] Thus, even if state departments of health, or state Title X clinics or their private supporters, vehemently disagree with the requirement to

[3] In 1989 over 142,000 women in Ohio were provided family planning services through Title X activities based on multiple sources of funding including state funds, client fees, Medicaid, and Title XX and Maternal and Child Health (MCH) Block Grants. *See* United States Department of Health and Human Services, Public Health Service, Bureau of Community Health Services, Common Reporting Requirement Fact Sheets, Table 2(B). (Summary reproduced at Appendix A). The combined funding sources provided $12,866,455.00 for health care services to women in Ohio with approximately 38 per cent comprised of Title X funds. *Id.*

suppress information, these non-federal parties must either accept the requirement that their *own funds* be used to suppress information, or must completely forego participation in Title X. Either alternative will have a dramatic effect on health care services provided to low income women across the county.

Like New York, the *amici* states are concerned that the amended regulations will have a devastating impact on health care services to low income women. It is feared that a significant number of reliable Title X providers will find continued participation in Title X to be medically and ethically unsound and will simply opt out of the program, making them able to serve far fewer women because of the substantial loss of funding.[4]

The substantial benefits of publicly funded family planning programs cannot be examined without an appreciation for the enormous role played by public health care dollars in providing services to low income women. Publicly funded family planning services play an important role in allowing substantial numbers of women to prevent unintended pregnancies. Researchers estimate the use of contraceptives from publicly funded providers are responsible for preventing up to 3.1 million unintended pregnancies annually. Forrest and Singh, *Public-Sector Savings Resulting from Expenditures for Contraceptive Services,* 22 Fam. Plan. Persp. 6, 11 (1990). Many low income women, without access to public health facilities, would no longer be able to prevent unintended pregnancies, resulting in a rise in unintended births and abortions. The amount of money saved[5] as a result

[4] "In spite of the diversity of the recipient clinics, their reactions to the Regulations are generally consistent. . . . [T]he National Family Planning and Reproductive Health Association, which represents 85 per cent of the recipients of federal money, predicts that the majority of current programs would refuse to withhold neutral abortion information from their clients." *Gag Rule,* 41 Stan. L. Rev. at 408, and n.38.

[5] The expenditure of funds for family planning services conserves additional state and federal government subsidies that would be spent for Medicaid, Aid for Dependent Children, General Relief, and other assistance.

of contraceptive use by women relying on publicly funded providers represents up to $11.26 for each dollar spent to provide those services, resulting in a total annual savings up to 4.6 billion dollars. *Id.* at 11-12.

Nationwide, eighty per cent of all Title X patient recipients have annual incomes below 150 per cent of the federal poverty level.[6] *Gag Rule,* 41 Stan. L. Rev. at 408 n.36. These are the persons who can least afford to pay for family planning services and yet are the very persons that will receive either less than full information upon which to make reproductive health choices or far fewer family planning services from non-federally funded programs.

B. THE AMENDED REGULATIONS WILL SUPPRESS THE FLOW OF COMPLETE MEDICAL INFORMATION NECESSARY FOR INFORMED CHOICE.

Despite Congress' numerous refusals to amend Title X to bar use of government funds to inform women of the availability of abortion, HHS in 1987 elected to accomplish the same result by administratively "reinterpreting" the Act. *See Abortion Counseling,* 77 Cal. L. Rev. at 1184-85. In so doing, HHS rejected its own longstanding interpretation of the Act to require "non-directive" counseling of pregnant patients regarding both abortion and its alternatives. *State of New York v. Sullivan,* 889 F.2d 401, 405 (2d Cir. 1989). The HHS amended regulations reverse the agency's stance by declaring the Title X "family planning" function to terminate with pregnancy. 42 C.F.R. §59.2 (1988). Under this guise of neutrality, the amended regulations then require the clinic's remaining dialogue with the pregnant patient to encourage childbearing.

[6] The Ohio Department of Health, Federation for Community Planning, and Planned Parenthoods of Summit, Portage, Medina Counties and Central Ohio combined in 1989 to serve a total of over 142,000 women. Of those women served, over 123,000 were at or below 150 percent of the federal poverty level. *See* Summary Table, Appendix A.

The HHS amended regulations seek to prevent pregnant women served by clinics funded under Title X from learning of the availability of abortion regardless of the circumstances. In fact, under the amended regulation a physician would be precluded from raising the issue of abortion or responding to questions raised by a patient even if carrying a child to term would result in a threat to the life or health of the mother. 42 C.F.R. §59.8(b) (1988).

The regulations forbid the clinic to provide any referral for an abortion. 42 C.F.R. §59.8(a)(1) (1988). However, the clinic is affirmatively required to refer the pregnant patient "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child."[7] 42 C.F.R. §59.8(a)(2) (1988). Any referral list given to the patient must exclude "health care providers whose principal business is the provision of abortions," but may *not* exclude, for any reason, any agency which does not provide abortions. 42 C.F.R. §59.8(a)(3) and (b)(4) (1988).

In case there is any doubt about the meaning or intent of the regulations, it is resolved by the examples contained therein. If a patient asks her physician whether an abortion is medically advisable, or even simply requests a referral for an abortion, the clinic physician's or health care professional's response is scripted by the amended regulations. The physician, regardless of the non-emergency medical condition, can only respond by stating "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. . . . [T]he project can help [you] to obtain pre-natal care. . . ." 42 C.F.R. §59.8(b)(5) (1988). The woman must then be given a list of all providers of pre-natal care from which any providers whose principal business is abortion must be excised. The clinic may neither include an abortion clinic, nor exclude a provider of pre-natal services, from the list. 42 C.F.R. §59.8(b)(3) and (b)(4) (1988). A woman requesting abortion referral services may not even be given the Yellow

[7] The only exception to the mandatory referral for pre-natal care is when emergency care is required. 42 C.F.R. §59.8(a)(2) (1988).

Pages to locate and call an abortion provider herself, since the telephone book constitutes a "list" which may contain "forbidden" providers. 53 Fed. Reg. 2922, 2942 (1988).

In the decision below the concurring judge found these regulations "jeopardize[ ] the ability of Title X physicians to safeguard the health of those seeking their expert advice." *State of New York v. Sullivan,* 889 F.2d at 415 (Cardamone J., concurring). The ban on providing even a telephone book to a needy client was deemed "a small and petty contrivance, inconsistent with our nation's high principles." *Id.*

II. THE DECISION OF THE SECOND CIRCUIT CONTRAVENES RULINGS OF THIS COURT WHICH PROTECT THE PRIVACY, LIBERTY, AND FIRST AMENDMENT INTERESTS IN WOMEN MAKING INFORMED CHOICES REGARDING THEIR REPRODUCTIVE HEALTH, AND WHICH PROHIBIT THE USE OF FEDERAL SPENDING TO INFLUENCE IMPROPERLY A STATE'S DISPOSITION OF ITS OWN RESOURCES.

A. THE AMENDED REGULATIONS IMPOSE AN IMPERMISSIBLE OBSTACLE TO A WOMAN'S PERSONAL REPRODUCTIVE CHOICE, IN VIOLATION OF HER LIBERTY AND PRIVACY RIGHTS AS PROTECTED BY THE CONSTITUTION.

Whatever degree of constitutional protection a woman's choice to abort her pregnancy may now enjoy, it is clear that, at the very least, the government may not impose impermissible obstacles to thwart the abortion decision. *Harris v. McRae,* 448 U.S. 297, 314, *reh. denied,* 448 U.S. 917 (1980); *Maher v. Roe,* 432 U.S. 464, 473 (1977). The HHS regulations fail even this minimal test.

This Court's decisions have made it clear that central to the woman's privacy right is the opportunity to make an informed decision. *See Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 759, 762 (1986); *City of Akron v. Akron Center for Reproductive Health,*

462 U.S. 416, 429-30 (1983). As observed in another context by the United States Court of Appeals for the District of Columbia Circuit:

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." True consent to what happens to one's self is the informed exercise of a choice, and that entails an *opportunity to evaluate knowledgeably the options available and the risks attendant upon each.* The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision.

Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972) (emphasis added) (footnotes omitted), *cited* in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. at 799 (White, J., dissenting).

The Second Circuit determined, on the basis of *Maher, Harris,* and *Webster v. Reproductive Health Services,* 109 S. Ct. 3040 (1989), that no one has the "right" to federally-funded abortion counseling. *State of New York v. Sullivan,* 889 F.2d at 410-12. The lower court reasoned that a pregnant woman, therefore, is left in the same position as if the government had funded no counseling at all, and none of her rights are infringed. *Id.* The conclusion, that the woman is constitutionally unharmed by this funding decision, defies reality, and constitutes a "shell game" with what is actually being funded.

Despite the regulations' disingenuous disclaimer that pregnancy counseling and referral are now beyond the scope of Title X family planning services, the rules *do* provide for federal funding of a counseling and referral conversation between health care professional and patient. The Title X

clinic is required to counsel the patient by telling her that the project deems abortion to be an inappropriate option, and it must refer her to providers of pre-natal care even if she wants an abortion. 42 C.F.R. §59.8(b)(5) (1988). Rather than simply refusing to subsidize counseling and referral, the regulations endeavor to censor the contents of the funded counseling and referral to conceal the abortion option from the patient.

Therefore, the patient does not remain in the same position as she would have been had the government decided not to fund any Title X services. As found by the First Circuit:

> We are particularly struck by the effect these restrictions have on poor women who are forced to rely on Title X clinics. They are significantly worse off than they would have been if the government had not provided the clinics because they have received misinformation rather than no information about their options. In addition, because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic.

Massachusetts v. Secretary of Health and Human Services, No. 88-1279, Slip. Op., 1990 U.S. App. LEXIS 4236, 52-53, (1st Cir. March 19, 1990) (en banc).

The amended regulations pose a trap for the unsophisticated and unwary patient. Although the exchange between the woman and Title X professional has all the appearances of government-sponsored counseling and referral, from which the patient is likely to conclude she has received full information, only incomplete counseling and referral have occurred. Although information about abortion is forbidden, information regarding pre-natal care must be given to pregnant women. 42 C.F.R. §59.7 (1988). Consequently, the patient has been affirmatively misled.

The government can therefore remain neutral, in the same sense it has been deemed by this Court to remain neutral in refusing to fund the entire abortion procedure, only by refusing entirely to fund *any* counseling and referral procedure. Neutrality can be accomplished only by either full disclosure of all options or by refusal to discuss *either* abortion or childbirth options with the patient, and by refusal to make *any* referrals to either pre-natal care or abortion service providers.[8] Otherwise, the regulations do not simply fail to remove obstacles to abortion; they create obstacles.

This case does not present a question which may be simply resolved on the basis of the government's power to tax and spend. The distorted information required to be dispensed compromises the patient's right to make a fully informed choice. As found by the Eighth Circuit in striking down a similar state ban on the use of state funds to counsel or encourage abortion:

> We think that the state's analogy of its ban on "encouraging or counseling" to bans on public abortion funding is completely inapt. Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.

Reproductive Health Services v. Webster, 851 F.2d 1071, 1080 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989). This finding was not disturbed in this Court's *Webster* decision. *See supra* at 4-5.

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[8] This is not to say that a prohibition on *any* counselling or referral would be consistent with the authorizing statute. *See* Petition of the State of New York, *et al.* at 16-22.

In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. at 444-45, this Court struck down an ordinance which required the physician to inform the patient of a "parade of horribles" which implied that the abortion procedure was particularly dangerous. The compulsory provision of misinformation to the patient was deemed to have imposed an "undue obstacle" to her freedom of reproductive choice. Eventually, even two of the three dissenters in *City of Akron* apparently agreed with this result:

> I have no quarrel with the general proposition, for which I read *Akron* to stand, that a campaign of state-promulgated disinformation cannot be justified in the name of "informed consent" or "freedom of choice."

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 800 (White, J., joined by Rehnquist, J., dissenting).

One is unable to choose between two options if one is kept unaware by the government that one has a choice at all. Intentionally incomplete and misleading information about one's options is indistinguishable from the "disinformation" at issue in *City of Akron*. Consequently, the result in this case should be the same. Because the counseling and referral required by the amended regulations create the impression of full disclosure while concealing the option to terminate pregnancy, the government has imposed an impermissible obstacle to a woman's right to choose. This Court should find the amended regulations violate the constitutional privacy and liberty interests in freedom of reproductive choice.

B. THE AMENDED REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF TITLE X PATIENTS AND HEALTH CARE PROVIDERS.

Maher, *Harris*, and *Webster* held that the government's control over its own purse strings justified a refusal to fund, or permit on its premises, abortion *procedures*, while at the

same time funding and permitting childbirth *procedures*. These cases did *not* reach the question whether the federal government may use its considerable taxing and spending powers to suppress *speech* regarding the advisability of abortion.

The First Amendment right to give and receive information about matters of great public concern remains firmly atop the heirarchy of constitutional values. *See e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). And the right to give and receive information about abortion has long been recognized as enjoying First Amendment protection. *Bigelow v. Virginia*, 421 U.S. 809 (1975). Because the contested rules directly regulate speech, the reliance placed by HHS and the Second Circuit on *Maher, Harris*, and *Webster* is misplaced. Rather, this Court's decisions on government's manipulation of First Amendment rights through its spending powers mandate the opposite result.

In *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530 (1980), this Court struck down a state regulation which forbade a public utility from inserting into its billings any discussion of "political matters," including the advisability of nuclear power. Naturally, public utilities are heavily-regulated entities which enjoy a state subsidy in the form of a state-created monopoly. *Id.* at 549 (Blackmun, J., dissenting). This Court noted:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. . . . If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Id. at 537-38, *quoting, Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (additional citations omitted).

Other of this Court's decisions have clearly suggested that the government's privilege to subsidize or refuse to subsidize speech ends where the funding choice is no longer content-neutral. *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), involved federal subsidies to charitable organizations in the form of tax deductions for contributions to these entities. This Court did hold that Congress could refuse to subsidize *all* lobbying activities by 501(c)(3) charitable organizations without violating those organizations' First Amendment rights. The Court was careful to point out, however, that the restriction on deductability for lobbying was content neutral. "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to' "ai[m] at the suppression of dangerous ideas." ' " *Id.* at 548, *citing, Cammarano v. United States*, 358 U.S. 498, 513 (1959), *quoting, Speiser v. Randall*, 357 U.S. 513, 519, *reh. denied*, 358 U.S. 860 (1958).

Similarly, in *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984), this Court struck down a prohibition on on-air "editorializing" by publicly-subsidized educational television stations. While arguing the content-neutral ban should be upheld, as a permissible election not to subsidize on-air editoralizing, the dissent noted:

> This is not to say that the Government may attach any condition to its largess; it is only to say that when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily" ' "aimed at the suppression of dangerous ideas." ' "

Id. at 407, (Rehnquist, J., dissenting), *quoting, Cammarano v. United States*, 358 U.S. at 513, in turn *quoting, Speiser v. Randall*, 357 U.S. at 519, in turn *quoting, American Communications Assoc. v. Douds*, 339 U.S. 382, 402 (1950). *See also Arkansas Writers' Project v. Ragland*, 481 U.S. 221

(1987).

Because the challenged regulations directly affect speech in a viewpoint-discriminatory manner, and are manifestly aimed at suppressing the "dangerous idea" of abortion, they cannot be upheld on the basis of *Maher, Harris,* and *Webster.*

Rather, this Court has long held that the state may not condition receipt of a valuable benefit on the forfeiture of a constitutional right. In *Perry v. Sindermann,* 408 U.S. 593, 597 (1972), the Court declared:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech .... This would allow the government to "produce a result which [it] could not command directly."

citing *Speiser v. Randall,* 357 U.S. at 526 (tax exemption subsidy cannot be conditioned on forced speech); *see also, Elrod v. Burns,* 427 U.S. 347 (1976) (continued public employment cannot be conditioned on forfeiture of rights to political association); *Sherbert v. Verner,* 374 U.S. 398 (1963) (unemployment benefits cannot be conditioned on relinquishment of religious convictions).

Here, HHS conditions the grant of Title X subsidies to family planning providers, and the grant of Title X-subsidized counseling and referral services to needy women, on both parties' relinquishment of their mutual First Amendment rights to exchange full and complete information about reproductive choices. This cannot be done consistently with the long-standing decisions of this Court.

C. THE AMENDED REGULATIONS IMPOSE UNCONSTITUTIONAL CONDITIONS UPON THE EXPENDITURE OF STATE FUNDS COMMITTED TO TITLE X PROJECTS.

The amended regulations affect the ability of states to use state revenues as they see fit to fund Title X projects. As previously discussed, the amended regulations redefine "Title X project" to include not only the federal Title X grant, but also the state, local, or private funds which must be committed to the Title X project. Therefore, the regulations pose a Hobson's choice for any states which do not agree that pregnant women are best served by state-enforced ignorance of their options. The state must either forego all federal aid for family planning services, or, to the extent it supplies matching funds, spend those funds in a manner the state might well find wholly objectionable. *See supra* at 6-7.

The regulations run afoul of the Constitution's Spending Clause. U.S. Const. art. I, §8. In *South Dakota v. Dole,* 483 U.S. 203, 207-08 (1987), this Court recently summarized the four separate constitutional limitations upon federal use of its spending power to influence a state's exercise of its own constitutional powers: 1) the federal spending exercise must be in pursuit of the "general welfare," and Congress is entitled to substantial deference in determining what the "general welfare" is; 2) any conditions on state acceptance of the grant must be unambiguous, in order that the state may know in advance the consequences of its participation; 3) the conditions must be related to the purpose of the federal expenditure; and 4) the federal spending power may not be used to induce the states to engage in activities which are themselves unconstitutional. The amended regulations fail all four tests.

First, keeping women in the dark regarding their reproductive options is not in anyone's best interest. Rather, this approach is directly antithetical to the philosophy, firmly embedded in the First Amendment, that the public interest is best served by the free competition of ideas in the

marketplace of public opinion. *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Further, as eloquently detailed in the *amicus* brief of the American Public Health Association, there are numerous circumstances under which the absolute prohibition on abortion referral will result in serious jeopardy to the health of the mother and will violate sound medical practice. Moreover, it is impossible to give deference to Congress' determination of the public interest when the amended regulations appear more a product of administrative fiat than an expression of Congressional will. *See* Petition of State of New York *et al.,* pp. 16-24; Petition of Dr. Irving Rust, *et al.,* pp. 20-27.

Second, some of the regulations impose conditions on state spending which are far from clear. For example, 42 C.F.R. §59.9 (1988) requires that at least some personnel or facilities used for "prohibited activities" be separate from those used for Title X activities, even if the prohibited activities are not funded by Title X. The separation requirements are merely factors to be considered by the Secretary of HHS in deciding whether a grantee is in violation of the regulations. The rule contains virtually no standards from which HHS bureaucrats may determine compliance, except that "mere bookkeeping separation" is insufficient. *Id.* Participating states will remain unsure under what circumstances they may separately fund "prohibited" abortion counseling and referral activities, without undergoing the crippling expense of employing separate personnel or obtaining separate physical facilities.

Third, Title X is, first and foremost, a public health program. The amended regulations operate in a manner contrary to the Congressionally-mandated purpose for the spending, in the same manner that they operate contrary to the "public welfare." Fourth, the amended regulations would induce the states to use state monies to support services performed in such a way as to violate the constitutional rights of women and health care professionals.

The new regulations far exceed a mere value judgment affecting the expenditure of federal dollars. The regulatory

scheme also conditions states' participation in Title X upon state acceptance of similar limitations on use of state funds, regardless of state policy. And the rules construct obstacles to the states' separate funding of balanced counseling and referral services which cannot be justified by the need for separate accounting for grant funds. Therefore, the amended regulations are unconstitutional under *South Dakota v. Dole,* 483 U.S. 203 (1987).

CONCLUSION

For all the foregoing reasons, the Court should grant the Writ of Certiorari sought by Petitioners.

Respectfully submitted,

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APPENDIX A

	(A) Total Women	(B) Women at or below 150% of poverty	(C) 1990 Title X Award	(D) Non-Title X	(E) State	(F) MCH Block	(G) Total Columns (C) - (G)
Ohio Dept. of Health	87,787	73,137	$2,932,323	$3,219,015	$431,000	$275,000	$6,857,338
Federation For Community Planning (Cleveland)	28,685	27,369	1,017,761	1,232,863	126,500	-0-	2,377,124
Planned Parenthood Summit, Portage and Medina Counties	15,051	13,490	525,230	1,518,763	55,000	-0-	2,098,993
Planned Parenthood Central Ohio	10,543	9,054	435,770	1,064,230	33,000	-0-	1,533,000
Totals	142,066	123,050	$4,911,084	$7,034,871	$645,500	$275,000	$12,866,455
			38.17%	54.68%	5.02%	2.14%	100%

Notes:

A. Total women provided family planning services through Title X activities

B. The number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.

C. Non-Title X includes first, second and third party reimbursement such as patient fees, insurance and Medicaid as well as agency operating funds.

D. The totals reflect funds that are subject to Title X regulations.